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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

SERVICE MERCHANDISE COMPANY, INC.
Petitioner,

v.

AMANA REFRIGERATION, INC. and DAVIS-WATKINS COMPANY
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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On December 7, 1982, Monsanto Company petitioned for certiorari in No. 82-914, seeking review of the Seventh Circuit's recent decision in *Spray-Rite Service Corporation* v. *Monsanto Company*, 684 F.2d 1226 (7th Cir. 1982). The filing of that petition strengthens and supports even further the grounds on which we relied, on November 19, 1982, in petitioning for certiorari in the present *Service Merchandise* case, No. 82-848. We therefore file this Supplemental Brief under Rule 22.6 of the Rules of this Court to call the Court's attention to the relationship between these two pending petitions filed less than three weeks apart.

A. The Seventh Circuit's Decision And The Recent Filing Of A Petition For Certiorari From That Decision.

In affirming the antitrust damage award against Monsanto, the *Spray-Rite* decision (684 F.2d 1226) flatly holds that a group boycott is *per se* unlawful and violates section 1 of the Sherman Act (15 U.S.C. § 1) where the manufacturer "agrees with some of its distributors to terminate [or simply refuse to renew the target's] distributorship or limit [the target's] access" to the manufacturer's products (684 F.2d at 1235). *Spray-Rite* further holds that proof of a dealer's complaints to the manufacturer about a competitor dealer's price-cutting and the manufacturer's termination of the price-cutting dealer in response to those complaints "is sufficient to support an inference of concerted action" (684 F.2d at 1238). Indeed, in the *Service Merchandise* case there is substantial direct evidence of concerted conspiratorial conduct. Petition at 20-21. There is no need to employ an inference.

The dispositive—and, in our view, entirely correct—holdings by the Seventh Circuit directly conflict with the refusal of the Sixth Circuit in *Service Merchandise* to allow a properly instructed jury to apply the same *per se* liability rule to identical anti-competitive and concerted activity between Amana and its distributors and dealers. Thus, *Spray-Rite* is still an additional court of appeals decision buttressing our earlier assertion in the *Service Merchandise* petition for certiorari that the Sixth Circuit's holding (in *Service Merchandise*) creates a conflict among the circuits in the interpretation of *Sylvania*.[1] Petition at 18. As already noted, on December 7, 1982, Monsanto filed a certiorari petition (No. 82-914, Oct. T.,

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[1] Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

1982), challenging the Seventh Circuit's above-described holdings in *Spray-Rite*.

B. The Sixth Circuit's Holding Conflicts Not Only With The Third Circuit's Decision In *Cernuto* But With The Seventh Circuit's Decision In *Spray-Rite* As Well.

Our pending petition for certiorari in *Service Merchandise* (No. 82-848) at pages 18-20 relies strongly on *Cernuto, Inc.* v. *United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979), as to the need for applying the *per se* rule and not the rule of reason. Moreover, "the present [*Service Merchandise*] case cannot be distinguished from *Cernuto* in any material respect." Petition at 20. We also show in our petition that *Cernuto* properly interpreted this Court's *Sylvania* decision and that the Sixth Circuit's *Service Merchandise* decision directly conflicts with *Cernuto* by rejecting the Third Circuit's interpretation of *Sylvania*. Petition at 19-21. In particular, the *Cernuto* decision emphasizes the impropriety of employing summary judgment procedures to deprive a plaintiff of a jury trial on the issue of *per se* liability. 595 F.2d at 165.

The Seventh Circuit's decision in *Spray-Rite* understandably and correctly follows the Third Circuit's *Cernuto* decision (684 F.2d 1234). That is why, of course, *Monsanto's* petition for certiorari (at page 21, note 26) finds it necessary to challenge *Cernuto* as well as *Spray-Rite*. Moreover, the *Monsanto* petition, at pages 23, 25 and 26, urges this Court to follow the incorrect views of the Sixth Circuit in *Service Merchandise*. Those views, of course, are the views we challenge in our pending petition in No. 82-848 as misinterpreting this Court's *Sylvania* decision and as leading the Sixth Circuit into conflict with the *Cernuto* decision.

In sum, the need for granting certiorari in *Service Merchandise* (No. 82-848) is underscored by the additional conflict in the circuits between *Service Merchandise* and *Spray-Rite*, and by the close interrelationship between the questions raised in our certiorari petition in No. 82-848 and those in the newly-filed *Monsanto* petition.

This additional conflict of decisions among the circuits, as highlighted by the *Monsanto* petition, aggravates the present uncertainty as to the reach and meaning of this Court's ruling in *Sylvania*. At the same time, the conflict necessarily precludes equal and fair application of the antitrust laws, forcing diametrically opposed results in the different circuits in near identical factual situations. This will no doubt spur still additional litigation in the lower courts throughout the country. Prompt clarification and resolution by this Court is therefore appropriate.

C. There Is Also An Unmistakable Conflict Between The Sixth Circuit's Holding In *Service Merchandise*, The Seventh Circuit's Decision In *Spray-Rite*, And The Decisions Of The Second, Third And Eighth Circuits.

In *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), the court of appeals ruled—incorrectly, in our view—that proof of a dealer's complaints to a manufacturer about a competitor dealer's price cutting, along with proof that the manufacturer terminated the dealer in response to those complaints, is not sufficient to support an inference of concerted action for the purpose of section 1 of the Sherman Act. The *Sweeney* decision is directly relied on by the Sixth Circuit in *Service Merchandise*. Petition App. at 16a. The Second Circuit also follows *Sweeney*. *Schwimmer* v. *Sony Corporation of America*,

677 F.2d 946 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3362 (Nov. 9, 1982).

The Eighth Circuit, on the other hand, has rejected *Sweeney. Battle* v. *Lubrizol Corp.*, 673 F.2d 948 (8th Cir. 1982). And the *Spray-Rite* decision (684 F.2d 1226) by the Seventh Circuit is an even more recent rejection of the *Sweeney* ruling. The Sixth Circuit's decision in *Service Merchandise* aggravates the conflict among the circuits because the decision, as we demonstrated in our petition, ignores substantial direct evidence of concerted action. Petition at 20-21.

Thus, on this highly important and recurring question, basic to effective administration of the Nation's antitrust laws, the circuits are truly in hopeless conflict. The Second, Third and the Sixth Circuit (in *Service Merchandise*) are aligned in direct conflict with the decisions of the Seventh and Eighth Circuits. The conflict of circuit decisions has now been made even more "unmistakable". 51 U.S.L.W. 3362 (Nov. 9, 1982) (dissent of Mr. Justice White from denial of certiorari in *Schwimmer*).

CONCLUSION

For these reasons and the reasons stated in our petition, it is submitted that the petition for a writ of certiorari in No. 82-848 should be granted and that the judgment of the Sixth Circuit should be summarily re-

versed with instructions to enter judgment for petitioner Service Merchandise on the issue of liability.

Respectfully submitted,

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December 29, 1982

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of December 1982, three copies of this Supplemental Brief For Petitioner were mailed, postage prepaid, to counsel for each respondent:

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